

SERVICE DATE - JULY 15, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33385

RAILROAD VENTURES, INC.--ACQUISITION AND OPERATION EXEMPTION--  
YOUNGSTOWN & SOUTHERN RAILROAD COMPANY

STB Docket No. 41991

OHIO RAIL DEVELOPMENT COMMISSION AND COLUMBIANA COUNTY PORT  
AUTHORITY--PETITION FOR DECLARATORY ORDER--CERTAIN ACTIONS OF  
RAILROAD VENTURES, INC.

Decided: July 1, 1997

By notice served and published in the *Federal Register* on April 24, 1997 (62 FR 20061), Railroad Ventures, Inc. (RVI),<sup>1</sup> was exempted from the prior approval requirements of 49 U.S.C. 10901 to allow it to acquire and operate approximately 35.7 miles of rail line owned by Youngstown & Southern Railroad Company (Y&S), extending from milepost 0.00, near Struthers, OH, to milepost 35.7, near Darlington, PA, and an additional 1-mile segment of the Smith Ferry Branch line near Negley, OH.<sup>2</sup> At the time the notice was served, a petition to reject, revoke, or stay<sup>3</sup> the notice of exemption, which was jointly filed on April 8, 1997, by the Ohio Rail Development Commission (ORDC)<sup>4</sup> and Columbiana County Port Authority (CCPA)<sup>5</sup> (collectively, petitioners), was pending.<sup>6</sup> Also pending was a petition for declaratory order, filed on February 5, 1997, in STB Docket No. 41991, by the same petitioners and involving the same issues as in the petition to reject, revoke, or stay.<sup>7</sup> Specifically, petitioners seek findings that RVI's acquisition of these railroad lines was void *ab initio*, that RVI must first obtain our approval before dismantling these lines, that RVI must cease and desist from interference with essential repairs, and that RVI must reconvey these lines back to their proper owner.

Because both of these proceedings involve the same issues, transaction, and parties, we are consolidating these proceedings for resolution in this decision.

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<sup>1</sup> RVI filed its notice of exemption on April 2, 1997.

<sup>2</sup> Pursuant to the notice of exemption, RVI also acquired incidental trackage rights over a 2.65-mile rail line between Struthers and Youngstown, OH, to allow it to interchange with Consolidated Rail Corporation and CSX Transportation, Inc.

<sup>3</sup> As explained in the notice, the exemption was not stayed prior to its scheduled effectiveness on April 9, 1997, because petitioners did not address the Board's stay criteria. *Railroad Ventures, Inc.--Acquisition and Operation Exemption--Youngstown & Southern Railroad Company*, STB Finance Docket No. 33385 (STB served Apr. 24, 1997), slip op. at 1, n.2 (*Railroad Ventures--Notice*).

<sup>4</sup> ORDC is a state agency charged with promoting economic development, rail branch line preservation, highway and rail safety, and passenger and commuter rail planning and development.

<sup>5</sup> CCPA is a quasi public agency established by the Board of County Commissioners of Columbiana County, OH, to promote economic development within Columbiana County. It assists private and public interests in efforts to assure the adequacy of the county's transportation services.

<sup>6</sup> RVI replied to the petition to reject, revoke, or stay on April 29, 1997.

<sup>7</sup> RVI replied to the petition for declaratory order on February 25, 1997.

## BACKGROUND

RVI's acquisition of the subject lines was consummated without appropriate authority on November 8, 1996. On November 19, 1996, Ohio & Pennsylvania Railroad Company (OPRC), which was the only carrier authorized to provide service,<sup>8</sup> embargoed the lines, stating as the cause for the embargo the cancellation of its lease.<sup>9</sup> Subsequently, our Office of Compliance and Enforcement (OCE) investigated the cessation of service. An agreement was reached among the parties for service to be restored, and the embargo was canceled.<sup>10</sup> However, washouts due to flooding in December made it impossible for service to resume as planned, and a second embargo was issued.<sup>11</sup>

On January 3, 1997, RVI filed a notice of exemption under 49 CFR 1150.31(a) for retroactive authorization of its purchase, stating that it had been unaware of the need for our approval of the acquisition. RVI's notice of exemption was rejected in *Railroad Ventures, Inc.--Acquisition and Operation Exemption--Youngstown and Southern Railway Company*, STB Finance Docket No. 33336 (STB served Jan. 9, 1997) (*Railroad Ventures--Rejection*), because RVI did not provide sufficient information to determine whether it qualified for the class exemption in light of CCPA's allegations that RVI would not operate the lines or arrange for another party to operate the lines.<sup>12</sup> CCPA maintained that RVI had purchased the lines solely to salvage them.<sup>13</sup>

On January 31, 1997, Wintrow Construction Corporation (Wintrow) attempted to obtain permission from RVI, through a general release form, to commence repairs on the lines in order to restore service. Funding for the reconstruction of the lines was made available by OPRC, ORDC, CCPA, the North East Ohio Trade & Economic Consortium, Mahoning County Commissioners, and other concerned public agencies. RVI apparently rejected Wintrow's general release indemnifying RVI from liability in connection with needed repairs and refused to allow the repairs to be made. In an attempt to stop RVI's interference with the repairs, petitioners filed their request for a declaratory order on February 5, 1997.

Also on February 5, 1997, due to the absence of further action by RVI after the Board's January 9, 1997 rejection of its notice of exemption, OCE again intervened by giving RVI 20 days in which to indicate its intentions with respect to refile for the requisite authority to lawfully acquire the Y&S railroad property. OCE's letter also admonished RVI against interfering with OPRC's authorized operations in the interim. On February 25, 1997, RVI replied to OCE and to the petition for declaratory order. In its reply to OCE, RVI indicates that it reached agreement with the contractor hired to repair the flood-damaged rail line; that repairs, which had been held up by

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<sup>8</sup> See *Ohio & Pennsylvania Railroad Company--Acquisition, Lease and Operation Exemption*, Finance Docket No. 32711 (Sub-No. 1) (ICC served July 3, 1995) (*Ohio & Pennsylvania*).

<sup>9</sup> See OHPA Embargo Notice No. 1-96, issued and effective on November 19, 1996.

<sup>10</sup> See OHPA Embargo Notice No. 1-96, issued on December 5, 1996, and effective on December 9, 1996.

<sup>11</sup> See OHPA Embargo Notice No. 2-96, issued and effective on December 18, 1996.

<sup>12</sup> RVI was not foreclosed from filing a new notice of exemption, provided that it disclose in detail its plans for operating the lines, Y&S's ownership or authority to sell the lines, RVI's arrangements with OPRC, and its arrangements to restore service.

<sup>13</sup> In a letter filed after the notice of exemption was rejected, CCPA submits a letter for the record dated January 6, 1997, from David L. Handel of Handel Investments, to Tracy V. Drake, Executive Director, CCPA, stating that RVI was actively evaluating the abandonment of the lines and any repairs that CCPA might make to the lines would be taken at CCPA's sole risk and expense. Handel Investments took over the management and day-to-day operations of RVI on December 16, 1996.

bad weather, would begin by February 28, 1997, and should take one to two months to complete; and that it intended to file for requisite acquisition and operating authority within 30 days.

Similarly, in its February 25, 1997 reply to the petition for declaratory order, RVI indicates that insurance and indemnification matters were resolved and that it was prepared to allow Wintrow onto the lines to start repairs by February 28, 1997.<sup>14</sup> RVI also states that it is negotiating a new lease agreement with OPRC to provide rail service over the lines. In its April 29, 1997 reply to the petition to reject, revoke, or stay, RVI reports that it has concluded an operating agreement with OPRC.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), we may revoke an exemption if we find that regulation of the transaction at issue is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101. Under this standard, we evaluate revocation petitions to see if regulation is needed. The party seeking revocation has the burden of proof and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary. *See CSX Transp., Inc.--Aban.--In Randolph County, WV*, 9 I.C.C.2d 447, 449 (1992); and *I&M Rail Link, LLC--Acquisition and Operation Exemption--Certain Lines of Soo Line Railroad Company D/B/A Canadian Pacific Railway*, STB Finance Docket No. 33326 *et al.* (STB served Apr. 2, 1997), slip op. at 6 (*I&M*). Our inquiry when revocation of an exemption is sought is similar to the analysis for determining if an exemption is proper at the outset of a proceeding, i.e., whether regulation of the transaction is necessary to carry out the RTP. This analysis focuses on the sections of the RTP related to the underlying statutory sections from which the exemption is sought. We apply this analysis in determining petitions to revoke an exemption under 49 U.S.C. 10502(d). *See Missouri Pac. R. Co.--Aban. Exempt.--Counties in Oklahoma*, 9 I.C.C.2d 18, 25 (1992); and *I&M*, slip op. at 6-7.

Petitioners submit that RVI's latest notice is as deficient as the first and "wholly unresponsive" to the specific requirements that we set forth in our prior order. Specifically, petitioners argue that RVI has failed to explain Y&S's ownership or authority to sell the lines,<sup>15</sup> RVI's arrangements with OPRC to operate the lines, and RVI's arrangements to restore service. Petitioners conclude that "RVI has not demonstrated the remotest interest in undertaking the obligations and responsibilities involved in an acquisition of an active line for the purpose of conducting continuing rail freight common carrier operations."

We disagree. As noted in *Railroad Ventures--Notice*, slip op. at 2, n.2, RVI, in its second attempt, provided sufficient information to invoke the class exemption for noncarriers acquiring and operating active rail lines and also provided responses to the questions posed in *Railroad Ventures--Rejection*. Accordingly, the exemption was allowed to take effect subject to our decision here on the petition to revoke. While RVI's explanation of Y&S's ownership of the lines is not entirely clear,<sup>16</sup>

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<sup>14</sup> RVI conditioned its consent on petitioners' counsel clarifying what interests petitioners might assert in the future in connection with funding the repairs.

<sup>15</sup> Petitioners point to OPRC's notice of exemption in *Ohio & Pennsylvania* to show that the lines were owned by P&LE Properties, Inc. (Properties), not Y&S.

<sup>16</sup> RVI explains that Y&S is a nonoperating railroad and a wholly owned subsidiary of the Montour Railroad Company (Montour), a nonoperating railroad, which in turn is a wholly owned subsidiary of Properties, the successor in interest to The Pittsburgh and Lake Erie Railroad Company (P&LE). Properties is a noncarrier and is presently in bankruptcy proceedings before the United States Federal District Court in Delaware. *In re Pittsburgh & Lake Erie Properties, Inc. AKA The Pittsburgh and Lake Erie Railroad Company*, 96-00406-HSB, filed March 26, 1996. Neither Montour nor Y&S is a debtor in the Properties bankruptcy proceeding. RVI appears to be arguing that Y&S owned the lines by virtue of its being a wholly owned subsidiary of the successor

(continued...)

the evidence of record appears to show that the bankruptcy court proceedings recognized that Y&S has a property interest to sell.<sup>17</sup> Moreover, the lack of clarity in the record regarding Y&S's ownership interest is not fatal. The Board's authorization is permissive and it is not essential to our purposes in permitting the proposed acquisition transaction to go forward that we conclude definitively that Y&S had an ownership interest in these lines that it could convey. *See Wisconsin & Southern Railroad Co.--Lease and Operation Exemption—Soo Line Railroad Company, D/B/A CP Rail System*, Finance Docket No. 32706 (ICC served Dec. 22, 1995). In any event, our main concern in rejecting the notice the first time was RVI's failure to acknowledge its common carrier obligation under 49 U.S.C. 11101(a),<sup>18</sup> which it now does. RVI has entered into an agreement with OPRC to provide service,<sup>19</sup> and, if RVI decides to abandon the lines, it first must obtain our abandonment authorization. Under these circumstances, no good reason exists to revoke or reject the exemption.

We are not unmindful of petitioners' concerns that service may not be restored, given RVI's initial statements that it was considering abandoning the lines and the history of this proceeding. To allay these concerns, we will monitor RVI's efforts to restore service and will impose, as a condition to our approval of RVI's acquisition of the lines, the following reporting requirement on RVI. RVI shall submit biweekly reports to OCE on the status of the lines' restoration and provide specific details of the cause for any delays in restoring service. After RVI notifies OCE that service has been fully restored over the lines, RVI may petition the Board to remove this condition in a further decision.

Our findings here, as well as events that have taken place since petitioners filed their request for a declaratory order, have resolved the issues presented in that petition. Accordingly, no controversy remains to be resolved. Therefore, we will deny petitioners' request to institute a declaratory order proceeding.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

*It is ordered:*

1. STB Finance Docket No. 33385 and STB Docket No. 41991 are consolidated.
2. The petition to reject or revoke the notice of exemption filed in STB Finance Docket No. 33385 is denied.
3. The petition to institute a declaratory order proceeding filed in STB Docket No. 41991 is denied.

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<sup>16</sup>(...continued)

in interest to P&LE. As far the exemption in *Ohio & Pennsylvania* is concerned, RVI contends that OPRC was merely using the existing designation for the P&LE when it filed its notice to lease and operate the lines.

<sup>17</sup> Petitioners submit that to the extent that P&LE is the real transferor, it should have filed for bankruptcy protection under 11 U.S.C. 1101, the provision specifically applicable to bankrupt rail carriers. This is a matter that is properly before the bankruptcy court, not this agency.

<sup>18</sup> Section 11101(a) provides, as pertinent: “[a] rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide transportation or service on reasonable request.”

<sup>19</sup> They have also agreed on line repairs.

4. Railroad Ventures, Inc., must file a bi-weekly report with the Board's Office of Compliance and Enforcement detailing all activities and problems in restoring these lines to a serviceable condition and the extent to which service is currently being provided by OPRC.

5. A copy of this decision will be filed with the United States Federal District Court in Delaware in *In re Pittsburgh & Lake Erie Properties, Inc. AKA The Pittsburgh and Lake Erie Railroad Company*, 96-00406-HSB, filed March 26, 1996.

6. This decision is effective upon its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary